IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HYTHEM I. AL-SALEM	:	**CIVIL ACTION**
	:	
v.	:	
	:	
BUCKS COUNTY WATER & SEWER AUTH.	:	**NO. 97-6843**

M E M O R A N D U M

WALDMAN, J. **March 25, 1999**

I. Background

This is an employment discrimination action. Plaintiff alleges that defendant failed to promote him, subjected him to a hostile work environment and constructively discharged him because of his race, national origin and religion in violation of 42 U.S.C. §§ 1981 and 1983 and Title VII of the Civil Rights Act of 1964. Presently before the court is defendant's motion for summary judgment.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material."

Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party may not rest on his pleadings, but must come forward with evidence from which a reasonable jury could return a verdict in his favor. See Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the evidence of record as uncontroverted or otherwise taken in a light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff is a United States citizen who emigrated from Libya.[1] He is an observant Muslim.

[1] Plaintiff avers in his complaint that he is of "Libyan national origin." In his brief in response to the instant motion, plaintiff is described as being of "Jordanian national origin." Statements in briefs, of course, are not evidence and no competent evidence has been submitted to show that plaintiff's national origin is other than Libyan.

Plaintiff has a bachelor's degree in electrical engineering. On February 6, 1991, defendant hired plaintiff as an apprentice. On June 6, 1991, at the recommendation of Ronald Kepner, the supervisor of defendant's Electrical Department, plaintiff was reclassified as an Electrician, Grade II (E-II). Defendant needed another electrician at the time and Mr. Kepner was aware that plaintiff had an engineering degree. This reclassification was a promotion and plaintiff's pay was raised accordingly. Under the collective bargaining agreement, plaintiff ordinarily would not have been eligible for designation as an E-II until he had spent a full year as an apprentice.

Under the collective bargaining agreement, "E" or electrical employees are paid at the same rate based on length of service as are "M" or mechanical employees. Electrical workers, however, have a better chance of drawing overtime duty and pay.

Mr. Kepner "told [plaintiff] to seek education in electricity because [his] work was not up to his standards." Plaintiff acknowledged in his deposition that his education had not adequately prepared him to be a practicing electrician. On September 1, 1992, plaintiff was reclassified as an M-II. Two weeks before plaintiff was reclassified, he overheard Joseph Pizzo, defendant's superintendent of operations and Mr. Kepner's supervisor, tell Mr. Kepner to find a job in the Electrical Department for Mr. Pizzo's nephew. He did so.

From September 1992 to March 1993, plaintiff was assigned to defendant's Totem Road facility where he had frequent contact with Joseph Pizzo. During that period, Mr. Pizzo made derogatory comments regarding plaintiff's ethnic background, specifically referring to plaintiff as a "camel jockey" and a "sand nigger." Plaintiff himself overheard only one such comment shortly after his arrival. He was told about another such comment of Mr. Pizzo by Tom Raiker, a co-worker, in the spring of 1993.[2] On three occasions in 1993, Mr. Pizzo offered plaintiff scrapple to eat. Scrapple contains pork. Plaintiff had previously told Mr. Pizzo that his religion forbade him to eat pork. On another occasion in 1993 plaintiff heard Mr. Pizzo encourage a co-worker who was cooking a pork dish to offer some to plaintiff.

Plaintiff was told by Steve Grosso, a co-worker, that at some point in or before January 1993, Mr. Kepner commented "as long as I'm in this department, Hythem will not make an E-I."[3] Sometime in 1993, Mr. Kepner asked plaintiff and another

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[2] Plaintiff could not place the time precisely but estimated that it was six to eight months after the comment he had overheard. No affidavit or deposition testimony from Mr. Raiker has been submitted to show that Mr. Pizzo in fact made the comment attributed to him by Mr. Raiker.

[3] While the court must assume for purposes of this motion from plaintiff's testimony that he heard this from Mr. Grosso, no affidavit or deposition testimony from Mr. Grosso has been submitted to show that he actually heard Mr. Kepner make this comment.

employee, Robert Shiffler, how long it took them to get their college degrees. Mr. Shiffler responded that it took four years. Mr. Kepner laughed and said "look at you now and look at me now. I'm your supervisor."

When plaintiff in 1994 asked to take classes at CHI Institute on electricity application at defendant's expense, the request was initially denied by Mr. Kepner. Plaintiff then appealed to Bud Sursa, defendant's executive director at the time, and the request was granted. As plaintiff acknowledged in a letter of January 4, 1995, the advanced education he requested cost defendant "a lot of money."

On June 6, 1994, plaintiff was promoted to the position of M-I and his pay was increased accordingly. Under the collective-bargaining agreement, three years of service as an M-II was required for eligibility for promotion to M-I. Plaintiff had been an M-II for less than two years. Defendant, however, gave plaintiff credit for the time he spent as an E-II in addition to the time he spent as an M-II. He was promoted to M-I exactly three years after he had become an E-II.

In October 1994, after completing the courses at CHI Institute, plaintiff contacted Benjamin Jones, defendant's executive director. Plaintiff complained to Mr. Jones that he felt discriminated against and asked to be reclassified as an electrician since he now met the requirements imposed by the

collective-bargaining agreement. Plaintiff told Mr. Jones that he believed there were people working as electricians in defendant’s Electrical Department who were not considered qualified for that assignment under the collective-bargaining agreement. Plaintiff did not identify any such person, but presumably had Mr. Pizzo's nephew in mind. Mr. Jones told plaintiff that he did not tolerate discriminatory conduct and that plaintiff would be a strong candidate for an E-I position opening up in August.

On January 4, 1995 and March 7, 1995, plaintiff wrote to Mr. Jones to express concern about having not received a promotion to E-I, about having been called "racist names" and about a feeling that he had been "set up to fail." When Mr. Jones met with plaintiff during this period he referred to "prior discrimination that he didn’t necessarily want to discuss because it was in 1992 or ‘93" and "he was more concerned about his future." Mr. Jones related plaintiff's concern to Authority board members sometime in March 1995. To the best of his recollection, this was done informally and not in the context of a board meeting.

After applying for the position, plaintiff was designated an E-I on August 14, 1995. Mr. Pizzo’s nephew had been promoted to this position the previous August although he had not "posted" for the position and had not then received a

certificate in applied electricity, a prerequisite for the E-I position under the collective-bargaining agreement.

Plaintiff was required to sign training and briefing sheets that E-Is previously had not been required to sign. As plaintiff acknowledges, however, all E-Is, including those who were not members of minority groups, were required to sign these forms certifying that they had received specified training or briefing regarding projects to which they had been assigned. Upon becoming an E-I, plaintiff lost the use of an Authority truck to commute between work and home.

On September 14, 1995, plaintiff filed a grievance. Plaintiff complained that he had been subjected to "unfair" and "discriminatory" treatment by Mr. Kepner. Plaintiff attributed this to a "perceived threat" to Mr. Kepner from plaintiff's "educational credentials" and Mr. Kepner's "personal dislike" of plaintiff. The specified particulars were the delay in his achieving E-I status, the loss of a company truck on his first day as an E-I and the requirement that he sign training and briefing sheets. After a hearing on October 5, 1995, Mr. Jones denied plaintiff's grievance. Mr. Jones determined that all Electrical Department employees were required to sign the same training and briefing forms as a safety measure, and that plaintiff was no longer permitted to use the truck because it was

assigned to the Mechanical Department for which plaintiff no longer worked.

When Mr. Pizzo saw plaintiff's grievance in September 1995, he again referred to plaintiff as a "sand nigger." The comment was heard by Mr. Shiffler but he did not repeat it to plaintiff. Mr. Shiffler did tell plaintiff in September 1995 that Mr. Pizzo and Mr. Kepner had made derogatory comments about plaintiff but declined to repeat them or to be more specific.[4]

Plaintiff received a job offer with better pay and benefits from General Instrument Corporation on October 18, 1995. Plaintiff submitted a letter of resignation on October 25, 1995, effective November 10, 1995.

Plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on November 29, 1995 and received a right to sue letter on August 12, 1997. Plaintiff filed his complaint on November 7, 1997.

IV. Discussion

Defendant contends that plaintiff has failed to sustain his claims with competent evidence and that, in any event, any such claims are time barred.

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[4] Mr. Shiffler testified that he assumed others had related to plaintiff the derogatory epithets used to describe him by Mr. Pizzo. The only competent evidence of record on the point, however, is plaintiff's testimony which belies that assumption. As noted, plaintiff testified only one such remark was repeated to him by Mr. Raiker in 1993.

A. Title VII Failure to Promote Claim

A discriminatory failure to promote is an "adverse employment action." See, e.g., Allen v. Michigan Dept. of Corrections, 165 F.3d 405, 410 (6th Cir. 1999). Defendant initially argues that any delay in changing plaintiff's classification from M-I to E-I could not constitute an adverse employment action because M-I and E-I employees are paid at the same rate. There is evidence, however, that E-I employees had greater opportunities than M-I employees for overtime work and pay. A discriminatory denial of overtime is a cognizable injury under Title VII. See Austin v. Ford Models, Inc., 149 F.3d 148, 153 (2d Cir. 1998); Bethea v. Ford Motor Co., 1993 WL 19705, *6 (D.N.J. Jan. 25, 1993).

There is, however, scant evidence of record that any delay in classifying plaintiff as an E-I was because of unlawful discrimination. At Mr. Kepner's recommendation, defendant promoted plaintiff to an E-II position even though he had completed only four months of a twelve month apprenticeship. Although plaintiff did not have the three years of experience ordinarily required for promotion to an M-I position, defendant gave him credit for his time as an E-II and promoted him three years to the day after he became an M-II. Plaintiff acknowledged that his education did not adequately prepare him to perform as an electrician. Defendant paid for plaintiff to take electrical

courses. Ten months after he completed those courses, he was promoted to an E-I position. The only evidence of record that an available E-I position was given earlier to someone with equal or lesser qualifications involves Mr. Pizzo's nephew and strongly supports a finding of nepotism, but not of racial, national origin or religious discrimination.

In any event, the failure to promote claim is time barred. As plaintiff acknowledges, an aggrieved person is required to file a charge with the EEOC within 300 days of the discriminatory act complained of. See Colgan v. Fisher Scientific, Inc., 935 F.2d 1407, 1414 (3d Cir.), cert. denied, 502 U.S. 941 (1991); Harris v. SmithKline Beecham, 27 F. Supp.2d 568, 576 (E.D. Pa. 1998). Plaintiff contends, however, that this claim is nevertheless viable under a continuing violation theory.

There are situations in which a plaintiff reasonably may not realize at the time that he has been discriminated against. See, e.g., West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995). To avail himself of the "continuing violation" theory, a plaintiff must show that at least one discriminatory act occurred within 300 days of his EEOC charge and that the discriminatory conduct was "more than the occurrence of isolated or sporadic acts of intentional discrimination." Id. at 755. A plaintiff may base his claim on conduct occurring outside the 300-day period only if "it would have been

unreasonable to expect the plaintiff to sue before the statute ran on that conduct." Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996).

Title VII failure to promote and hostile environment claims are distinct. See Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 483-84 (3d Cir. 1997). There is a "natural affinity" between hostile environment claims and the continuing violation theory because almost by definition these involve discriminatory acts which occur over time. Id. at 482. On the other hand, an employee generally knows when he has been denied a promotion to which he believes himself entitled. An untimely failure to promote claim cannot be resuscitated by alleging incidents of harassment within the 300 days preceding plaintiff's EEOC filing. Id. at 483-84.

Plaintiff knew when Mr. Pizzo's nephew was given an E-I position on August 15, 1994, 471 days before plaintiff filed his discrimination charge. On January 4, 1995, 329 days before filing his EEOC charge, plaintiff wrote to Mr. Jones complaining of the failure to promote him to an E-I position and other acts which he attributed to being "judged" not on ability but on "national origin" and "skin color." It is clear that plaintiff knew more than 300 days before filing his EEOC charge that he had been denied a promotion or reclassification to which he believed himself entitled for reasons he viewed as discriminatory.

B. Title VII Hostile Environment Claim

Title VII "is not limited to 'economic' or 'tangible' discrimination." Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2283 (1998). "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1001 (1998) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)).

In determining the existence of a hostile environment, the courts look at all the circumstances including the frequency of the conduct, the severity of the conduct, whether it is physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably interferes with an employee's work performance. Faragher, 118 S. Ct. at 2283. The employee's perception of a hostile environment must be subjectively felt and objectively reasonable. Id.

While they should never be condoned,"[r]acial comments that are sporadic or part of casual conversation do not violate Title VII." McCray v. DPC Industries, Inc., 942 F. Supp. 288, 293 (E.D. Tex. 1996). "For racist comments, slurs and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of

sporadic racist slurs, there must be a steady barrage of opprobrious racial comments." Schwapp v. Town of Avon, 118 F.3d 106, 110-11(2d Cir. 1997).

Plaintiff asserts that he was subjected to discriminatory harassment "throughout the course of his employment" with defendant. He points to the delay in promoting him to an E-I position, Mr. Kepner's 1993 remark that "I'm your supervisor," Mr. Pizzo's racially derogatory references in 1992 and 1993, Mr. Pizzo's offers of food containing pork to plaintiff in 1993, the loss of the use of a truck after his promotion to an E-I position, the requirement that he sign training and briefing sheets and the earlier unspecified remarks attributed to Messrs. Pizzo and Kepner by Mr. Shiffler in September 1995.

As noted, the only evidence of record that an available E-I position was given earlier to someone with equal or lesser qualifications involves Mr. Pizzo's nephew and does not support a find of unlawful discrimination. Even assuming it was discriminatory, evidence relating to plaintiff's delayed promotion would be more prejudicial than probative and thus inadmissible on plaintiff's hostile environment claim. See Rush, 113 F.3d at 485 (reversing judgments for plaintiff on hostile environment and constructive discharge claims because admission of evidence relating to time barred failure to promote claim may have influenced jury verdict as to liability on timely claims).

Requiring plaintiff to sign the training and briefing sheets cannot reasonably be viewed as discriminatory. It is uncontroverted that these forms were introduced for safety reasons and that other E-I employees who were not members of a protected class were also required to sign them.

Plaintiff's loss of the use of a truck does not rationally support an inference of unlawful discrimination. It is uncontroverted that no non-supervisory employee had a right to the use of a truck to commute. It is uncontroverted that plaintiff lost the use of the truck only upon his transfer from the department to which the truck was assigned. Mr. Kepner's remark "look at me now . . . I'm your supervisor" was directed to Robert Shiffler as well as plaintiff. There is no evidence of record that Mr. Shiffler is a member of a protected class. Mr. Kepner's remark may have been arrogant or presumptuous. It may have reflected a certain scorn for formal education and a distaste for the college educated. One cannot reasonably find, however, that this remark was made because of plaintiff's race, religion or national origin.

One could reasonably find that in offering or encouraging another to offer plaintiff food containing pork several times after being told plaintiff's religion forbade him to eat pork, Mr. Pizzo was taunting plaintiff because of his religion. Mr. Pizzo's use of an offensive ethnic or racial epithet in referring to plaintiff would clearly be

discriminatory. That plaintiff only once heard Mr. Pizzo use such a term is not dispositive. Racially derogatory comments by a supervisor which are then repeated to the plaintiff can impact the work environment. See Schwapp, 118 F.3d at 111-12. There is, however, no competent evidence of record that plaintiff was aware of other racially or ethnically derogatory remarks by Mr. Pizzo until interviews and depositions after he filed his EEOC charge.

Plaintiff testified that he was told in 1993 by a co-worker, Tom Raiker, that Mr. Pizzo had called plaintiff a "sand nigger," but no affidavit or deposition testimony of Mr. Raiker that he actually heard such a remark has been submitted. Even accepting this as competent evidence, the record would support a finding that plaintiff was aware of Mr. Pizzo's use of a racially or ethnically offensive term in the fall of 1992 and in the spring of 1993. Mr. Shiffler, a portion of whose deposition was submitted, testified that he heard Mr. Pizzo make such remarks on other occasions but did not repeat them to plaintiff. Mr. Shiffler did tell plaintiff in September 1995 that Mr. Pizzo had made derogatory remarks about him but declined to elaborate or repeat them. The use of even one racial or ethnic epithet cannot be justified and warrants censure by an employer. An employee's work environment however, cannot be altered or rendered abusive by epithets of which he has no knowledge.

There is no evidence of record that plaintiff was physically threatened or humiliated, that his work was sabotaged or that he was otherwise hindered in performing his assigned duties. There is no evidence of confrontation. There is evidence that plaintiff was aware Mr. Pizzo used an ethnically or racially offensive term in referring to him in the fall of 1992 and the spring of 1993. There is evidence that on several occasions in 1993 Mr. Pizzo showed disrespect for plaintiff's religious practice.

There is no ready measure for frequency or severity. See, e.g., Schwapp, 118 F.3d at 111-12 (ten racially hostile incidents plus other offensive statements repeated to plaintiff sufficient); Bolden v. PRC, Inc., 43 F.3d 545, 551 (10th Cir. 1994), (two racial slurs and several other derisive remarks insufficient), cert. denied, 516 U.S. 826 (1995); Boutros v. Canton Regional Transit Authority, 997 F.2d 198, 200-01 (6th Cir. 1993) (numerous and continual ethnic slurs by three supervisors and other co-workers directed at plaintiff or used in his presence sufficient); McCray, 942 F. Supp. at 293 (six racial insults by foreman and co-worker over twelve months insufficient). The offensive comments to which plaintiff was exposed appear to be no more pervasive or severe than those found insufficient by other courts to sustain a hostile environment claim, particularly where there has been no interference with a

plaintiff's ability to perform his work. The court, however, need not definitively resolve whether plaintiff has presented sufficient evidence to sustain a hostile environment claim. This is because any such claim is time barred.

The offensive racial remarks and derisive disregard for plaintiff's religion of which he was aware occurred in 1992 and 1993. A plaintiff cannot extend the limitations period by later complaining to a supervisor about discriminatory remarks made long before or an employer could be perpetually set up for a lawsuit. See Garland v. Shapiro, 579 F. Supp. 858, 860-61 (E.D. Mich. 1984) (claimant cannot perpetuate limitations period by subsequently or periodically complaining about or seeking redress for prior unlawful conduct). A plaintiff cannot show that he was subjected to a workplace permeated with discriminatory ridicule or insult with evidence of remarks unknown to him before the filing of his charge.[5]

Moreover, the comment attributed by Mr. Shiffler in his deposition to Mr. Pizzo in September 1995 is virtually identical to those heard by or related to plaintiff in 1992 and 1993. A plaintiff "may not sit back and accumulate all the discriminatory

[5] This is not a situation where evidence of harassment or ridicule of other protected class members may be probative to demonstrate the motive for the plaintiff's treatment. There is no question that each offensive remark of Mr. Pizzo contemporaneously heard by or later repeated to plaintiff would on its face show a discriminatory animus.

acts and sue on all within the statutory period applicable to the last one." Garrison v. Burke, 165 F.3d 565, 570 (7th Cir. 1999) (quoting Moskowitz v. Trustees of Purdue University, 5 F.3d 279, 282 (7th Cir. 1993)). See also Harris v. SmithKline Beecham, 27 F. Supp.2d 569, 577 (E.D. Pa. 1998)(same); LaRose v. Philadelphia Newspapers, Inc., 21 F. Supp.2d 492, 498 (E.D. Pa. 1998) (same); Dupont-Lauren v. Schneider (USA), Inc., 994 F. Supp. 802, 816 (S.D. Tex. 1998) (same).

Plaintiff was aware in 1993 that on at least six occasions Mr. Pizzo had insulted or ridiculed plaintiff because of his race, ethnicity or religion. If this did not give rise to a hostile environment claim at that time, it did not do so by virtue of any subsequent discriminatory treatment of which plaintiff has presented competent evidence.

C. Title VII Constructive Discharge Claim

To sustain a constructive discharge claim, a plaintiff must prove that his employer knowingly engaged in conduct which foreseeably resulted in working conditions so intolerable or unpleasant that a reasonable person in the employee's position would resign. See Durham Life Ins. Co. v. Evans, 165 F.3d 139, 155 (3d Cir. 1999); Connors v. Chrysler Financial Corp., 160 F.3d 971, 974 (3d Cir. 1998); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996). Summary judgment is appropriate if a trier of fact could not reasonably conclude that a

reasonable person in the plaintiff's shoes would have felt compelled to resign. Hopson v. Dollar Bank, 994 F. Supp. 332, 340 (W.D. Pa. 1997).

A reasonable person would not feel compelled to resign in October 1995 because of insults experienced in 1992 or 1993. A reasonable person who felt aggrieved by not receiving an earlier promotion would not feel compelled to resign ten weeks after securing that promotion. The only allegedly discriminatory acts of which plaintiff was aware between the time of his promotion to an E-I position and his resignation were the loss of the use of a truck and the introduction of the training and briefing sheets. From the record presented, no reasonable person could find that the loss of the use of a truck to commute or the need to sign training and briefing forms resulted from a discriminatory motive or resulted in working conditions so intolerable that a reasonable employee would have resigned.

Plaintiff left to take a better job. The evidence of record does not reasonably support a conclusion that plaintiff was constructively discharged.

D. § 1983 Claim

When 42 U.S.C. § 1983 is used as a parallel remedy with Title VII, the elements of the substantive claims are essentially the same. See Boutros, 997 F.2d at 202 (citing additional cases). There is, however, no respondeat superior liability

under § 1983. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1295 (3d Cir. 1997). A municipality is liable for a constitutional tort only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" complained of. Id. (quoting Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978)).

"Policy" is made when a decisionmaker with final authority to establish municipal policy with respect to the action in question issues an official proclamation, policy or edict. A "custom" is a course of conduct which, although not formally authorized by law, reflects practices of state officials that are so permanent and well settled as to virtually constitute law. In either case, it is incumbent upon a plaintiff to show that a final policymaker is responsible for the policy or custom at issue. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481-82 (1986); Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990). A municipal official is not a final policymaker if his decisions are subject to review and revision. See Morro v. City of Birmingham, 117 F.3d 508, 510 (11th Cir. 1997). Liability under § 1983 may be predicated on a final policymaker's omissions if this inaction evinces "deliberate indifference" to the rights of those with whom an offending subordinate comes into

contact. See Bonenberger v. Plymouth Township., 132 F.3d 20, 25 (3d Cir. 1997).

As defendant acknowledges, its board of directors clearly has final policymaking authority in virtually all matters. There is also evidence which suggests that the board may have delegated to the executive director some authority over personnel matters without the need to secure a vote of the board. There is evidence that after receiving plaintiff's March 1995 letter, Mr. Jones at least informally related to board members the concerns voiced by plaintiff. While there is no evidence of formal action by the board thereafter, it is quite a leap to infer deliberate indifference on its part or that of Mr. Jones on the record presented.

After plaintiff expressed his concerns to Mr. Jones, the executive director, he reiterated the Authority's policy against discrimination of any kind. Plaintiff shortly thereafter received the promotion he believed he deserved when the next opening occurred. The only allegedly discriminatory acts initiated after plaintiff contacted Mr. Jones and after he talked to the board were the loss of the use of the truck and the introduction of the training and briefing forms. Mr. Jones inquired into these actions and determined, for reasons uncontroverted on the record, that they were not discriminatory.

In any event, plaintiff's § 1983 claim is time barred. The applicable limitations period is two years. See Sameric Corp. of Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998). The limitations period runs from the date the plaintiff knows, or reasonably should know, of the injurious conduct on which the § 1983 claim is based. Id.; Baker v. Board of Regents of State of Kansas, 991 F.2d 628, 632 (10th Cir. 1993).[6]

The last allegedly discriminatory act of which plaintiff complains is the loss of his job, by constructive discharge, because of his race, national origin and religion. Plaintiff resigned on October 25, 1995, more than two years before he filed suit. Plaintiff argues that the limitations period, however, should run from the effective date of his resignation. Plaintiff relies on Jacecko v. Schweitzer, 1992 WL 74175 (E.D. Pa. Mar. 27, 1992). Plaintiff misreads Jacecko. The Court in Jacecko in fact observed that the latest possible date on which the plaintiff's § 1983 claim could have accrued was the

[6] The limitations period for a parallel § 1983 constitutional claim is not tolled by the pendency of an EEOC charge. See Johnson v. Railway Express Agency, 421 U.S. 454, 466 (1975); Black v. Broward Employment and Training Admin., 846 F.2d 1311, 1313-14 (11th Cir. 1988); Carter v. District of Columbia, 14 F. Supp.2d 97, 102 (D.D.C. 1998); Linville v. State of Hawaii, 874 F. Supp. 226, 228 (N.D. Ill. 1992), aff'd, 19 F.3d 21 (7th Cir. 1994); Zangrillo v. Fashion Institute of Technology, 601 F. Supp. 1346, 1351 (S.D.N.Y. 1985).

date he resigned because by that date he would have had to know of the injury which formed the basis of his lawsuit. Id. at *1.

The limitations period for a § 1983 claim for discriminatory termination of employment runs from the date the plaintiff knows of the termination and not the last actual day of work. See Chardon v. Fernandez 454 U.S. 6, 8 (1981); Morris v. Government Development Bank of Puerto Rico, 27 F.3d 746, 748-49 (1st cir. 1994); Ching v. Mitre Corp., 921 F.2d 11, 14-15 (1st Cir. 1990); Kuemmerlein v. Bd. of Education of Madison Metropolitan School Dist., 894 F.2d 257, 259-60 (7th Cir. 1990). See also Burger v. City of Daytona Beach, 1996 WL 674144, *5 (M.D. Fla. Oct. 9, 1996), aff'd, 135 F.3d 143 (11th Cir. 1998). Plaintiff, who claims he resigned on October 25, 1995 because for discriminatory reasons he was subjected to intolerable conditions, clearly knew by that date of all the injurious conduct giving rise to his § 1983 claim.

E. § 1981 claim

Plaintiff states in the preamble to his complaint that defendant's alleged conduct violated § 1981, as well as § 1983 and Title VII.[7] Plaintiff specifically pleads § 1983 and Title VII claims respectively in the two counts which follow. There is

[7] Section 1981 encompasses intentional discrimination because of nationality, ancestry or ethnicity. See Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987).

no third count and it is unclear whether plaintiff intended actually to assert a distinct § 1981 claim. Defendant merely states in a footnote that plaintiff has not pled or proven a § 1981 claim. Plaintiff makes no reference to a § 1981 claim in his brief.

Whether there is a right of action under § 1981 at all for a plaintiff alleging employment discrimination by a state actor is questionable. See Johnson v. City of Fort Lauderdale, 148 F.3d 1228, 1229 n.2 (11th Cir. 1998); Dennis v. County of Fairfax, 55 F.3d 151, 156 n.1 (4th Cir. 1995); Williams v. Little Rock Municipal Water Works, 21 F.3d 218, 224 (8th Cir. 1994); Villanueva v. City of Fort Pierce, 24 F. Supp.2d 1364, 1368 & n.8 (S.D. Fla. 1998); Tabor v. City of Chicago, 10 F Supp.2d 988, 991 (N.D. Ill. 1998); Stinson v. Pennsylvania State Police, 1998 WL 964215, *3 n.3 (E.D. Pa. Nov. 2, 1998). In any event, the applicable limitations period for a § 1981 claim is also two years. See Harris v. SmithKline Beecham, 27 F. Supp.2d 569, 576 (E.D. Pa. 1998); Sminkey v. Southeastern Pennsylvania Transportation Auth., 1998 WL 401686, *2 (E.D. Pa. June 30, 1998). Any § 1981 claim in this case would be time barred.

V. Conclusion

Defendant concludes in its reply brief with some justification that plaintiff has substituted excessive rhetoric and representations in his brief for actual competent evidence of

record. Particularly insofar as plaintiff seeks to pyramid such things as the loss of the use of a truck and the need to sign training and briefing forms into hostile environment and constructive discharge claims, his case does appear to be contrived. In any event, plaintiff has failed to present competent evidence to sustain any claim which is not clearly time barred.

Accordingly, defendant's motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HYTHEM I. AL-SALEM	:	**CIVIL ACTION**
	:	
v.	:	
	:	
BUCKS COUNTY WATER & SEWER AUTH.	:	**NO. 97-6843**

O R D E R

AND NOW, this day of March, 1999, upon consideration of defendant's Motion for Summary Judgment and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT is ENTERED** in the above action for the defendant.

BY THE COURT:

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JAY C. WALDMAN, J.